92-427

No. _____

Supreme Court, U.S.
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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term 1992

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CHARLES G. DANNIS and STEPHEN T. CROSSON
Petitioners

V.

RESOLUTION TRUST CORPORATION, Receiver for First Savings and Loan Association of Waco, Receiver for First Savings and Loan Association of Temple, and Conservator of First Savings and Loan, F.A., Temple, Texas,
and
NORTHPARK JOINT VENTURE, STEVEN S. SCHIFF, BARRY HOWARD, ROBERT L. SCHIFF, CHARLES H. PERRY, HERBERT G. SCHIFF, and TELSTAR PARTNERSHIP
Respondents

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PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED FOR REVIEW:**

QUESTION 1 -- DUE PROCESS

1. Did the Trial Court's denial of relief on the Petitioners' Cross-Claims without a motion, hearing, or trial deny the Petitioners due process of law? . . . . . 26

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4. Did the Court of Appeals fail to apply the choice of law rules of the forum state? . . . . . 44

## LIST OF ALL PARTIES

The names of all interested parties and their capacities are listed in the footnote hereto.[1]

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[1] Petitioners/Appellants: Charles G. Dannis and Stephen T. Crosson, Dallas, Texas.

Petitioners' Attorneys: Robert D. Lybrand and Deborah A. Wilson, Dallas, Texas.

Respondent/Appellee: The Resolution Trust Corporation.

Resolution Trust Corporation's Attorneys: G. Dennis Sheehan and Carla M. Calabrese, Haynes and Boone, Fort Worth, Texas.

Respondents/Appellants: Steven S. Schiff, Barry Howard, Robert L. Schiff, Charles H. Perry, Herbert G. Schiff and Telstar Partnership.

Respondents/Appellants' Attorneys: Tom Thomas and Alan Moore, Kolodey & Thomas, Dallas, Texas.

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## OFFICIAL REPORT OF THE OPINION OF THE COURT OF APPEALS

*Resolution Trust Corporation v. Northpark Joint Venture*, 958 F.2d 1313 (5th Cir. 1992)

## STATEMENT OF JURISDICTION

(i) The Judgment of the Fifth Circuit Court of Appeals, affirming the Judgment below, was entered on April 24, 1992.[2]

(ii) All Motions for Rehearing, including Petitioners' Motion, were denied on May 21, 1992.[3]

(iii) 28 U.S.C.A. § 1254(1) (Supp. 1992) confers jurisdiction on the Supreme Court to review the judgments of the Courts of Appeal by Writ of Certiorari.

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[2] App. at 3.

[3] App. at 2.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

**U.S. CONST. art. IV, § 1**

STATES - RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

**U.S. CONST. amend. V**

No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. CONST. amend. XIV, § 1**

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**28 U.S.C.A. § 1291 (Supp. 1992)**

FINAL DECISIONS OF DISTRICT COURTS

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States,

the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**12 U.S.C.A. § 1441a(l)(1) (Supp. 1992)**

POWER TO REMOVE; JURISDICTION

(1) In general

Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have

original jurisdiction over such action, suit, or proceeding.

(2) Corporation as party

The Corporation shall be substituted as a party in any civil action, suit, or proceeding to which its predecessor in interest was a party with respect to institutions which are subject to the management agreement dated February 7, 1989, among the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation.

(3) The Corporation may, without bond or security, remove any such action, suit or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect

to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit, or proceeding shall be instituted -
(A) not later than 90 days after the date the Corporation is substituted as a party, or (B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after August 9, 1989. The Corporation may appeal any order of remand entered by a United States district court.

**28 U.S.C.A. § 1254(1) (Supp. 1992)**
COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may

be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

**FED. R. CIV. P. 54(b)**

JUDGMENT; COSTS

(b) Judgment upon multiple claims or involving multiple parties

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon a express determination that there is no just

reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

**FED. R. CIV. P. 56(a)-(d) (1982 & Supp. 1992)**

SUMMARY JUDGMENT

(a) For Claimant. A party seeking

to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any party thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if tne pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**MISS. CODE ANN. §89-1-55 (1972)**

How lands sold under mortgages and deeds in trust.

All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trust or other contracts shall be sold in the county in which the land is located or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for three consecutive weeks preceding such sale, in

newspaper published in the county, or, f none is so published, in some paper aving a general circulation therein, and y posting one notice at the courthouse f the county where the land is situated, or said time, and such notice and dvertisement shall disclose the name of he original mortgagor or mortgagors in aid deed of trust or other contract. No ale of lands under a deed of trust or ortgage, shall be valid unless such sale hall have been advertised as herein rovided for, regardless of any contract ot he contrary. An error in the mode of ale such as makes the sale void will not e cured by any statute of limitations, xcept as to the ten-year statute of dverse possession.

**TEX. PROP. CODE ANN. § 51.002 (Supp. 1992)**

SALE OF REAL PROPERTY UNDER CONTRACT LIEN

(a) A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. The sale must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located. The commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area

is designated by the commissioners court, the notice of sale must designate the area at the courthouse where the sale covered by that notice is to take place, and the sale must occur in that area.

(b) Notice of the sale, which must include a statement of the earliest time at which the sale will occur, must be given at least 21 days before the date of the sale:

(1) by posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;

(2) by filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) by the holder of the debt to

which the power of sale is related serving written notice of the sale by certified mail on each debtor who, according to the records of the holder of the debt, is obligated to pay the debt.

(c) The sale must begin at the time stated in the notice of sale or not later than three hours after that time.

**TEX. PROP. CODE ANN. § 51.005 (Supp. 1992)**

JUDICIAL OR NONJUDICIAL FORECLOSURE AFTER JUDGMENT AGAINST GUARANTOR - DEFICIENCY

(a) This section applies if:

(1) the holder of a debt obtains a court judgment against a guarantor of the debt;

(2) real property subject to a deed of trust or other contract lien securing the guaranteed debt is sold at a

foreclosure sale under Section 51.002 or under a court judgment foreclosing the lien and ordering the sale;

(3) the price at which the real property is sold is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency; and

(4) a motion or suit to determine the fair market value of the real property as of the date of the foreclosure sale has not been filed under Section 51.003 or 51.004.

(b) The guarantor may bring an action in the district court in the county in which the real property is located for a determination of the fair market value of the real property as of the date of the foreclosure sale. The suit must be brought not later than the

90th day after the date of the foreclosure sale or the date the guarantor receives actual notice of the foreclosure sale, whichever is later. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include:

(1) expert opinion testimony;

(2) comparable sales;

(3) anticipated marketing time and holding costs;

(4) cost of sale; and

(5) the necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the property to arrive at a fair market value as of the date of the foreclosure sale.

## STATEMENT OF THE CASE

Petitioners, Charles G. Dannis and Stephen T. Crosson, and others, executed a Limited Guaranty of the indebtedness of Northpark Joint Venture. Northpark Joint Venture was the maker of a Note in the original principal amount of $9,150,000.00 (the "Note"). The Note was secured by a Deed of Trust covering land located in the State of Mississippi (the "Deed of Trust"). The Deed of Trust expressly provided that Mississippi law would apply to the Deed of Trust.[4]

The holders of the Note[5] sold the

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[4] App. at 32.

[5] The Note was assigned to First Savings and Loan Association of Waco and First Savings and Loan Association of Temple by the original payee, Texas State Mortgages, Inc. The RTC is holder of

real property securing payment of the Note at a non-judicial trustee's sale conducted under the provisions of the Deed of Trust and applicable Mississippi law.

The Note's payees filed suit against the maker and guarantors in the 14th Judicial District Court, Dallas County, Texas. Each Petitioner filed a Cross-Claim against Telstar Partnership, a co-defendant, based upon a written indemnity agreement.[6] The Resolution Trust Corporation (the "RTC") was then substituted for the original Plaintiffs as the receiver or conservator of those

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the note as successor to those institutions, their successor institutions, or the Federal Savings and Loan Insurance Corporation. App. at 18, footnote 4.

[6] App. at 85 and 89.

entities.

The Petitioners maintained that a deficiency could not be recovered without proof that such deficiency was equitable as required by Mississippi law.[7] The RTC concedes both that Mississippi law requires that proof and that it was absent from the summary judgment proceedings. The RTC contends that Texas law was controlling and did not require proof that a deficiency was equitable.[8]

Petitioners' Cross-Claims were not the subject of any Motion for Summary Judgment or other motion. No trial, hearing, or other action was taken regarding the relief requested in Petitioners' Cross-Claims.

Summary Judgment was granted against

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[7] App. at 33.

[8] App. at 29.

all Defendants remaining in the case.[9] The Court then rendered a Final Judgment[10] against all Defendants, ordering that "all relief sought by Defendants is hereby denied"[11] and "[a]ll relief not specifically herein granted is hereby denied."[12]

The trial court's denial of relief on Petitioners' Cross-Claims was raised on appeal to the Court of Appeals. The Court of Appeals did not address that

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[9] Northpark Joint Venture filed for bankruptcy relief and was dismissed from the lawsuit. App. at 16.

[10]. The Court of Appeals opinion erroneously states that the state court found the guarantors liable for $32,202,500. The state court's finding was for $3,202,500. App. at 17.

[11] App. at 81.

[12] App. at 84.

ground of error in its opinion.[13]

Petitioners again raised that issue in their Motion for Rehearing.[14] That issue was not addressed in the order overruling that Motion for Rehearing.[15]

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[13] App. at 3.

[14] App. at 97.

[15] App. at 2.

## BASIS FOR FEDERAL JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C.A. § 1291 in an appeal from a final judgment of the Federal District Court.

The Federal District, Northern District of Texas, had jurisdiction pursuant to 12 U.S.C.A. § 1441a(1)(1) after the substitution of the RTC for the original Plaintiffs pursuant to 12 U.S.C.A. § 1441a(1)(2). The RTC removed the case from the 14th Judicial District Court, Dallas County, Texas, under the provisions of 12 U.S.C.A. § 1441a(1)(3).

## ARGUMENT

QUESTION 1 -- DUE PROCESS

1. Did the Trial Court's denial of relief on the Petitioners' Cross-Claims without a motion, hearing, or trial deny the Petitioners due process of law?

The trial court's judgment denied the Petitioners relief on their cross-claims without notice or a reasonable opportunity to be heard. The entry of judgment on Petitioners' Cross-Claims without a hearing or trial constitutes a departure from the usual course of judicial proceedings which calls for the exercise of the Supreme Court's power of supervision. The constitution, applicable statutes and rules require that notice and hearing be afforded to Petitioners on their Cross-Claims.

The Court of Appeals' failure to reverse the decision of the trial court, or to address the issue when raised on appeal, both sanctions the action of the trial court and in itself constitutes such a departure from the usual course of judicial proceeding by the Court of Appeals as to call for the exercise of the Supreme Court's supervision.

The Fourteenth Amendment's due process clause[16] guarantees Petitioners reasonable notice and a reasonable opportunity to be heard and to present their claims.[17] The particular form or method of procedure is ascertained with due regard to the nature of the proceeding and the character of the

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[16] U.S. CONST. amend. XIV, §1.

[17] *Dohany v. Rogers*, 281 U.S. 362, 369, 50 S.Ct. 299, 302, 74 L.Ed. 904, 912 (1930).

rights affected.[18]

The Fifth Amendment[19] limits the power of courts to dispose of a party's claims without affording an opportunity for a hearing on the merits.[20]

The language of the Trial Court's judgment leaves no question as to its finality and its effect on Petitioners' Cross-Claims. A judgment with language clearly indicating that the judgment is to be the trial court's final act is a final judgment.[21] "The intention of the judge is crucial in determining

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[18] *Id.*

[19] U.S. CONST. amend. V.

[20] *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

[21] *Vaughan v. Mobile Oil Expl. & Prod. S.E.*, 891 F.2d 1195, (5th Cir. 1990).

finality."[22] The final paragraphs of the judgment make the judge's intention clear.[23]

The Court of Appeals has held, consistent with other courts of appeal, that a trial court cannot grant a summary judgment without a motion therefor.[24] The applicable rule of procedure clearly requires a written motion as a prerequisite for entry of a summary judgment.[25]

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[22] *Id.* at 1197.

[23] "It is FURTHER ORDERED, ADJUDGED AND DECREED that all relief sought herein by Defendants is hereby DENIED.

All relief not specifically herein granted is DENIED". App. at 83-4.

[24] *Capital Films Corp. v. Charlie Fries Productions, Inc.*, 628 F.2d 387 (5th Cir. 1980).

*Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 235, 242 (8th Cir. 1977)

[25] FED. R. CIV. P. 56.

A trial court can enter a final judgment on fewer than all the claims or parties.[26] It must, however, make the express determination that there is no reason for delay and direct that final judgment be entered as to the claims and parties affected.[27] That procedure would have left the Petitioners' Cross-Claims intact for later adjudication. The trial court did not make that express determination nor direct that final judgment be entered as to only some of the claims and parties.

The denial of relief on Petitioners' Cross-Claims will deprive them of property without due process of law. The indemnity rights they sought to enforce

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[26] FED. R. CIV. P. 54b

[27] *Id.*

could shift the burden of the judgment from the Petitioners to the indemnifying Defendants.[28] The Petitioners' common law right to contribution from their co-debtors does not afford them that protection. Contribution allows only the forced pro rata sharing of the loss;[29] indemnity would allow Petitioners to

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[28] "An indemnity clause purports to shift responsibility for the payment of damages from one party to another." *Whitson v. Goodbodys, Inc.*, 773 S.W.2d 381, 382 (Tex. App. -- Dallas 1989, writ denied)

[29] Each joint obligor in a contract is liable to the other for any payments made in excess of the joint obligor's share. *Nelms v. Chazanow*, 404 S.W.2d 359, 362 (Tex. Civ. App. --Houston 1966, no writ).

That right is based upon the "principles of equity and natural justice." *McKelroy v. Hamilton*, 130 S.W.2d 1114, 1116 (Tex Civ. App. -- Waco 1939, no writ).

shift the loss entirely.

The denial of relief on the Cross-Claims will deprive the Petitioners of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. That denial of relief without a motion, hearing or trial is also contrary to applicable authorities, statutes, and rules.

QUESTION 2 -- DUE PROCESS

2. Did the Court of Appeals' failure to review the denial of Petitioners' Cross-Claims deny the Petitioners due process of law?

The opinion of the Court of Appeals failed to address the trial court's adjudication of the cross-claims. That failure was despite the Petitioners' assignment of error to the denial of their cross-claims.[30]

The Court of Appeals' silence is a clear departure from the usual and accepted course of judicial review. The issue, once raised, required the court to address it. The Court of Appeals deprived Petitioners of due process of law by failing to address the issue.

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[30] App. at 105-113.

QUESTION 3 -- FULL FAITH AND CREDIT, EQUAL PROTECTION

3. Does the full faith and credit clause or the equal protection clause of the United States Constitution require the application of Mississippi law to the Deed of Trust and the sale conducted thereunder?

The Court of Appeals' failure to afford full and faith and credit to the laws of the State of Mississippi in this case is contrary to the applicable decisions of the Supreme Court.

A federal court must apply the choice of law rules of the state in which it sits.[31] That federal court is, however, bound to observe the demands of the full faith and credit clause in

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[31] *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

implementing those choice of law rules.[32]

The full faith and credit clause requires that the public acts of every state be given the same effect by the courts of another state that they have by law and usage at home.[33] A statute is a "public act" within the meaning of the full faith and credit clause.[34] The law of a state is comprised of both its common law rules as well as its statutes.[35]

The equal protection clause requires

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[32] *Bradford Elec. Light Co., v. Clapper*, 286 U.S. 145, 155, 52 S.Ct. 571, 574, 76 L.Ed. 1026, 1033 (1932).

[33] U.S. CONST. art. IV, § 1; *Chicago & Alton R. Co., v. Wiggins Ferry Co.*, 119 U.S. 615, 7 S.Ct. 398, 30 L.Ed. 519 (1887).

[34] *Id*.

[35] *Magnolia Petroleum. Co., v. Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943).

that all persons within a state's jurisdiction receive the equal protection of its laws.[36]

In *Bradford Elec. Light Co. v. Clapper*,[37] the United States Supreme Court reviewed a federal court's refusal to allow a defendant to assert a substantive defense arising under the state law applicable to the case. In *Bradford, supra*, the federal court, sitting in Vermont, had refused to allow the defendant to assert a defense available under New Hampshire law, the substantive law applicable to the cause of action. The federal court's jurisdiction was based upon diversity of citizenship.

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[36] U.S. CONST. amend. XIV, § 1

[37]. 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932).

The Supreme Court held that although a court could, consistent with the full faith and credit clause, decline to enforce a cause of action arising under the laws of another state, it could not refuse to give effect to a substantive defense arising under the applicable law of another state.[38] The Supreme Court observed that, under the facts of that case, the failure to give effect to the substantive defense subjected the defendant to irremediable liability. [39]

The Court of Appeals has likewise violated the full faith and credit clause in failing to apply Mississippi law to the Deed of Trust and the sale conducted thereunder. Without the rights and

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[38] *Id.* at 286 U.S. 160, 52 S.Ct. 576, 76 L.Ed. 1036.

[39] *Id.*

protections afforded by Mississippi law after a trustee's sale under the terms of a deed of trust, the Petitioners' become liable for the deficiency claimed by the RTC without any means to challenge the validity of the sale or the sufficiency of the proceeds therefrom.

Texas law affords the Petitioners the right to assert the substantive defenses and claims of the principal in so far as they are determinative of the existence of the principal's liability.[40]

The threshold question in establishing a guarantor's liability is the existence and extent of the principal's obligation. Only when that

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[40] *National Sur. Corp. v. United States*, 143 F.2d 831 (5th Cir. 1944); *Stevens v. First Bank & Trust*, 540 S.W.2d 572 (Tex. Civ. App. -- Dallas 1976, writ ref'd n.r.e.).

obligation is established can a guarantor's liability be determined.

The principal's obligation cannot be determined without reference to all payments and credits due against the original obligation, including the application of the proceeds from the sale of any collateral.

The procedures for enforcement of the lien are contained in the provisions of the Deed of Trust. The Deed of Trust provides that it is governed by Mississippi law.[41] Under Mississippi law there is no right to a deficiency after a trustee's sale until the creditor proves that it would be equitable, in light of sales price, to authorize a deficiency

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[41] *App. at 41.*

judgment.[42]

The holder of the Note was not required to proceed against the collateral prior to resorting to the guarantors for payment.[43] Having chosen to conduct a trustee's sale, however, the holder of the Note became bound by Mississippi law. Mississippi law rendered the principal's continued liability contingent upon the creditor's proof that it was entitled to a deficiency. As conceded by the RTC, that proof has not been made in this case.

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[42] *Lakehill Side Estate, Inc. v. Galloway*, 473 So.2d 461, 466 (Miss. 1985); *Mississippi Valley Title Insurance Company v. Horne Construction Company*, Inc., 372 So.2d 1270 (Miss. 1979)

[43] *Metze v. Entman*, 584 S.W.2d 512 (Tex. Civ. App. -- Houston [14th Dist.] 1979, no writ)

If, as held by the Court of Appeals, Mississippi law is not available to the guarantors as the standard against which the sale is judged, then only Texas law is available to gauge the propriety of the sale. The inadequacy of Texas law for that task, if not obvious on the face of the proposition, is clear after even a cursory review of Texas law.

Texas law does not provide a viable basis to challenge a trustee's sale that is not conducted under the laws of and within the boundaries of Texas.[44] Neither the design nor the application of Texas law affords a guarantor any basis to challenge the propriety of a trustee's sale in Mississippi. Case authority in Texas likewise does not afford the guarantor a equitable or legal

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[44] TEX. PROP. CODE ANN. §51.002 (Supp. 1992).

basis for challenging an deed of trust sale conducted outside of Texas.

In Texas, the inadequacy of bid price alone would not generally entitle a debtor to invalidate a trustee's sale.[45] Other challenges are available, however,[46] such as the inadequacy of the bid price if that inadequacy is shown to be coupled with a defect in procedure.[47] In the absence of Mississippi law to establish the requisite procedure, however, no defect of procedure can be

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[45] *American Sav. & Loan Ass'n v. Musick*, 531 S.W.2d 581 (Tex. 1975).

[46] Recision available if the foreclosure was process defective. *Grella v. Berry*, 647 S.W.2d 15 (Tex. App. -- Houston [1st Dist.] 1982, no writ).

[47] *University Sav. Ass'n. v. Springwood Shopping Center*, 644 S.W.2d 705 (Tex. 1982)

established to invoke those remedies.[48]

The Court of Appeals' decision allows the creditor to enjoy the benefits of Mississippi law without subjecting the creditor to the duties and impact of that same law. The Petitioners, however, are denied the benefits and rights under those same statutes. The full faith and credit clause and equal protection clause prohibit this selective application when it deprives a party of the protections secured by those constitution provisions.

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[48] Texas has since enacted TEX. PROP. CODE ANN. §51.005 (Supp. 1992). That statute provides a statutory procedure for a guarantor to challenge the adequacy of a bid price. The issue of the statute's applicability to a trustee's sale conducted in another state is both questionable and irrelevant. The statute is only applicable to sales occurring after its enactment.

QUESTION 4 -- CHOICE OF LAW

4. Did the Court of Appeals fail to apply the choice of law rules of the forum state?

The failure of the Court of Appeals to apply the choice of law rules of the forum is in direct conflict with the decisions of the Supreme Court. The Supreme Court's decisions require the application of the Texas choice of law rules in diversity cases before federal courts in Texas.

A federal court must apply the choice of law rules of the state in which it sits.[49]

In Texas, the law of the state chosen by the parties in an enforceable

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[49] *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

contract provision, must be applied.[50]

The Court of Appeals fails to cite any authority from any jurisdiction that would support its threshold holding that the choice of law provision in the Deed of Trust was unenforceable. The Court of Appeals instead creates its own rule of law, holding without citation to authority, that "Because the deed of trust does not provide the source for the action against the defendants, the choice of law clause in the deed of trust is not enforceable: The parties cannot be said to have agreed that Mississippi law should govern a deficiency judgment action against the guarantors."[51]

This "source of action" rule relied

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[50] *DeSantis v. Whackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).

[51] App. at 34-5.

upon by the Court of Appeals is not part of the Texas choice of law rules. Its application demonstrates the failure to address the real issue presented by the choice of law issues.

The issue is not whether the underlying action is based upon the Deed of Trust or Note. The issue is whether the parties' choice of law in the Deed of Trust is valid.

The Texas choice of law authority cited by the Court of Appeals, when applied to the facts and circumstances of the Deed of Trust's choice of law provision, compels the finding that the parties choice is valid. The opinion is devoid of reasoning or authority for holding that the provision is unenforceable without subjecting it to the choice of law authorities found to be

controlling by the Court of Appeals. Nothing in Texas law requires that the entire transaction be governed exclusively by one state's laws nor renders unenforceable every choice of law provision contained in a document other than the document evidencing the primary right sought to be enforced.

The Court of Appeals, in creating its "source of action" rule, embarks on an independent "general law" theory of conflict of laws, a judicial course long condemned by applicable Supreme Court decisions.[52]

## CONCLUSION

The denial of the Petitioners'

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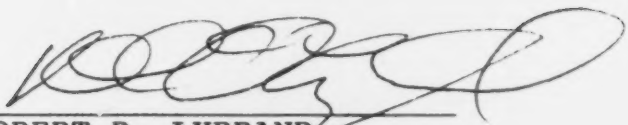
[52] *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020,1021, 85 L.Ed. 1447, 1480 (1941).

Cross-Claims and failure to address that issue on appeal have deprived the Petitioners of due process of law and is contrary to the applicable authority. Those actions will subject the Petitioners to the loss of their property without an opportunity for a hearing or trial.

The failure of the trial court and Court of Appeals to apply Mississippi law to the Deed of Trust, and to the sale conducted thereunder, violates the full faith and credit and equal protection clauses of the United States Constitution. Those actions are also contrary to the applicable decisions of the Supreme Court.

Petitioners pray that this petition be granted.

Respectfully submitted,



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